IN THE CIRCUIT COURT OF THE TWELTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

Michael T. Flynn,
Plaintiff,

v. Case No.: 2023 CA 004264 NC

Jim Stewartson,
Rick Wilson,
MeidasTouch LLC,
Defendants.

_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant, JIM STEWARTSON (hereinafter "Defendant"), by and through his undersigned attorneys, hereby moves this honorable Court to dismiss the Plaintiff's Second Amended Complaint with prejudice, and in support thereof states as followed:

I. INTRODUCTION

Defendant moves this Court to dismiss Plaintiff's Second Amended Complaint with prejudice in favor of the Defendant because Plaintiff's Second Amended Complaint is a strategic lawsuit against public participation that is prohibited under Florida law (Fla. Stat. § 768.2985). This ruling would moot all other grounds for dismissal.

Should this Court decline to dismiss the Second Amended Complaint in favor of the Defendant under Fla. Stat. § 768.295, Defendant alternatively moves to dismiss the Plaintiff's Second Amended Complaint for failure to state a cause of action upon which relief may be granted. Finally, Defendant seeks dismissal because the addition of a Co-Defendants in both the Amended Complaint (Rick Wilson) and this Second Amended Complaint (MediasTouch LLC) is misjoinder.

Notably, the Second Amended Complaint failed to cure or clarify the numerous defects cited in Defendant's Motion to Dismiss the Complaint, Defendant's Motion to Dismiss Amended Complaint, or solidify the allegations made in either the Complaint or Amended Complaint. Instead, Plaintiff used its one amendment it is entitled to as a matter of course (under Fla. R. Civ. P. 1.190(a)) to add an unrelated Defendant to this action and change the dollar amount in controversy (from less than $75,000 to $10 million) in such a way that seeks to deprive the Defendant of his right to move to transfer this action to federal court, without curing or even addressing any of the deficiencies set forth in Defendant's initial Motion to Dismiss, then sought leave to amend to file a Second Amended Complaint to add an additional co-Defendant and further increase the amount in controversy (to $50 million).

II. PLAINTIFF'S AMENDED COMPLAINT IS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP) PROHIBITED UNDER FLA. STAT. § 768.295.

Defendant moves this Court, pursuant to Fla. Stat. § 768.295, to dismiss Plaintiff's Second Amended Complaint with prejudice.

A. THE LEGAL STANDARD FOR A MOTION TO DISMISS ON ANTI-SLAPP GROUNDS.

Defendant's Motion to Dismiss on these grounds is a statutorily-based Motion to Dismiss specifically provided for under Fla. Stat. § 768.295. Therefore, the legal standard for assessing the appropriateness of this Motion to Dismiss substantially differs from most Motions to Dismiss.

While a Motion to Dismiss generally requires a Court to simply accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant, the 2d DCA has held that a Motion to Dismiss based upon the anti-SLAPP statute requires the trial court to do more. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. 2d DCA 2019).

Rather, in a Motion to Dismiss based upon the anti-SLAPP statute, the Defendant must demonstrate a *prima facie* case that the anti-SLAPP statute applies—in that the Plaintiff's suit was based on some activity that would qualify as an exercise of the Defendant's First Amendment rights in connection to issues of public importance. *Id.* Then, the burden of proof shifts to the Plaintiff to demonstrate that the Defendant's activity was actionable. *Id.* This procedure serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. *Id.*

Denial of a Motion to Dismiss on anti-SLAPP grounds is an appealable non-final order. Notably, in *Gundel v. AV Homes, Inc.*, the 2d DCA quashed a trial court order denying a Motion to Dismiss, For Judgment on the Pleadings, or For Summary Judgment because the allegations contained within the pertinent counterclaim were too vague to permit the trial court to determine whether the alleged conduct was protected free speech. *Id.* at 315.

Fla. Stat. § 768.295 is intended to serve as an expeditious method of resolving strategic lawsuits against public participation.

B. THE LEGAL STANDARD FOR DEEMING A LAWSUIT AS A PROHIBITED SLAPP LAWSUIT

Fla. Stat. § 768.295(3) states that "A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue."

As a journalist, Defendant has exercised his constitutional right of free speech by publishing content critical of a public figure in connection with public issues. The Plaintiff appears to be attempting to silence Defendant's journalistic endeavors and constitutional right of free speech through the filing of this lawsuit. Thus, this lawsuit is prohibited under Fla. Stat. § 768.295(3).

C. DEFENDANT HAS MADE A *PRIMA FACIE* SHOWING OF IRREPARABLE HARM SIMPLY BY BEING FORCED TO DEFEND THIS LAWSUIT.

In *Gundel*, the Second DCA held that the target of a strategic lawsuit against public participation (SLAPP) is harmed by "the very filing and continuation" of the SLAPP, and thus, someone petitioning the Court for dismissal on SLAPP grounds has made a *prima facie* showing of irreparable harm. 264 So. 3d at 310.

D. THERE IS A *PRIMA FACIE* CASE THAT PLAINTIFF'S LAWSUIT APPEARS TO BE A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION.

i. Plaintiff is a widely known political figure, and thus is a "public figure."

Under the factual allegations contained within Plaintiff's Second Amended Complaint, it is unclear whether the Plaintiff concedes his status as a public figure—a status which has real legal significance to this case.

If Plaintiff's status as a public figure is in fact disputed, Defendant hereby outlines facts to support an ultimate determination by this Court that Plaintiff is in fact a public figure.

Plaintiff, MICHAEL FLYNN, spent most of his career serving in the United States Army, retiring as a lieutenant general. Plaintiff played a key role in shaping U.S. counterterrorism strategy and dismantling insurgent networks during the Afghanistan and Iraq Wars, often being given combat arms, conventional, and special operations senior intelligence assignments.[1] He became director of the Defense Intelligence Agency in July 2012. In spite of these significant accomplishments, Plaintiff was not reappointed to that position in 2014 due to concerns about his chaotic management style, hard-

[1] https://www.nytimes.com/2020/05/09/us/politics/michael-flynn.html

edged views about counterterrorism, perceived insubordinance, and close affiliations with Russian nationals.[2]

Former Joint Chiefs of Staff, National Security Advisor, and Secretary of State General Colin Powell described such reasons in a private email (which was subsequently leaked) as being that Plaintiff was "abusive with staff, didn't listen, worked against policy, bad management, etc."[3] Subsequently, he was forced into retirement or, as General Powell said, Plaintiff got "canned out of DIA."[4]

Upon Plaintiff's forced retirement from the United States Army, Plaintiff entered the world of private consulting, and given his resume, he was able to attract high-paying clients.[5] Plaintiff's financial disclosure for 2016 showed income between $1.37 and $1.47 million, mostly being earned from consulting.[6] Plaintiff's clients included companies connected with Russia and serving as a foreign agent of the Turkish government.[7] Plaintiff's payments from Russian companies were subsequently investigated by the United States Department of Justice.[8]

Plaintiff entered the world of electoral politics during the 2016 presidential election, providing consulting to five candidates before becoming an official advisor to the Trump campaign in early 2016 around the time President Trump became the apparent Republican nominee.[9] At the 2016 Republican National Convention, Plaintiff led a chant of "lock her up" (referring to placing former U.S. Secretary of State Hillary Clinton in prison) in front of tens of thousands of people.[10]

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[2] https://www.nytimes.com/2020/05/09/us/politics/michael-flynn.html; https://www.nytimes.com/2018/05/18/us/politics/trump-fbi-informant-russia-investigation.html
[3] https://www.washingtonpost.com/news/checkpoint/wp/2016/09/15/michael-flynn-trumps-military-adviser-says-colin-powells-emails-include-really-mean-things/
[4] *Id.*
[5] https://www.nytimes.com/2020/05/09/us/politics/michael-flynn.html
[6] https://www.nytimes.com/2017/04/01/us/politics/michael-flynn-financial-disclosure-russia-linked-entities.html
[7] https://www.nytimes.com/2017/06/18/us/politics/michael-flynn-intel-group-trump.html
[8] *Id.*
[9] https://www.washingtonpost.com/news/checkpoint/wp/2016/08/15/trump-adviser-michael-t-flynn-on-his-dinner-with-putin-and-why-russia-today-is-just-like-cnn/
[10] https://time.com/5044847/michael-flynn-hillary-clinton-republican-convention-lock-her-up/

Upon Donald Trump becoming President, Plaintiff was appointed United States National Security Advisor on January 22, 2017. Plaintiff's tenure in the position proved to be short-lived, as he resigned on February 13, 2017 over providing incomplete information to Vice President Pence and others regarding his contacts with the Russian Ambassador.[11] Plaintiff was ultimately charged criminally (and initially pled guilty to) with making false statements to FBI agents regarding his conversations he had with the Russian Ambassador during a January 24, 2017 interview, as well as for making false statements in connection to filings under the Foreign Agents Registration Act.[12] Plaintiff's sentencing was delayed due to his ongoing cooperation with other investigations, but Plaintiff was openly rebuked by a federal judge who stated "Arguably, you sold your country out . . . I'm not hiding my disgust, my disdain for this criminal offense."[13] In spite of Plaintiff's earlier guilty plea, the U.S. Department of Justice attempted to drop the charges (which delayed a final adjudication of the case), and Plaintiff was ultimately pardoned by President Trump on November 25, 2020.

By accepting a pardon, Plaintiff implicitly confessed to any crimes he may have committed and acknowledged guilt for such crimes. This is because the U.S. Supreme Court has held that accepting a pardon "carries an imputation of guilt" and acts as a confession. *Burdick v. United States*, 236 U.S. 79, 94 (1915). Most federal courts have upheld *Burdick*'s findings on the implications of a pardon. See *United States v. Noonan*, 906 F.2d 952, 958-59 (3d Cir. 1990); *In re N.*, No. 86-6, 1994 U.S. App. LEXIS 40850, at *9 (D.C. Cir. Oct. 21, 1994); *United States v. Kolfage*, 2021 U.S. Dist. LEXIS 98819, at *9 (S.D.N.Y. May 25, 2021). While some courts have more liberally construed the implications of a pardon, the absence of a formally stated reason for Plaintiff's pardon[14] along with that the pardon occurred in the context of an ongoing

[11] https://www.nytimes.com/interactive/2017/02/13/us/politics/document-Michael-Flynn-Resignation-Letter.html
[12] *United States v. Flynn*, 411 F. Supp. 3d 15 (D.D.C. 2019)
[13] https://www.reuters.com/article/us-usa-trump-russia-flynn-idUSKBN1OH0D7
[14] https://www.politico.com/f/?id=00000176-1b60-d27b-a5f6-db7067980000

criminal prosecution speaks for itself even under more liberal theories of the meaning of a pardon. See *Lorance v. Commandant*, 13 F.4th 1150, 1158 (10th Cir. 2021). Therefore, it is not unreasonable for an individual such as Defendant to view Plaintiff's acceptance of a pardon as an acknowledgment of his guilt for committing certain crimes.

After Plaintiff's departure from the Trump administration, he has remained a vocal public political figure. Some examples of Plaintiff's public political activism include: In September 2019, Plaintiff was a scheduled speaker at a "Digital Soldiers Conference"; notably, Plaintiff previously claimed that President Trump's 2016 election was the result of an "army of digital soldiers."[15] [16]The alleged purpose of this particular conference was to prepare "patriotic social media warriors" for a "digital civil war."[17]

Since the November 2020 election, Plaintiff has furthered his political advocacy. The Associated Press has reported that Plaintiff has organized and headlined events on the ReAwaken America Tour, which has reached tens of thousands of people across the country in approximately fifteen (15) cities and towns.[18] According to counts by the Associated Press and PBS Frontline, Plaintiff made more than sixty (60) in-person speeches in twenty four (24) states throughout 2021 and 2022.[19]

Locally, in Sarasota County, Plaintiff has also become a public political figure. In 2021, Plaintiff attended rallies in protest of COVID-19 vaccine and mask mandates that had thousands of attendees. He was also a headliner of a Halloween event at the same venue.[20] Flynn also has inserted himself into

[15] https://www.motherjones.com/politics/2019/08/michael-flynn-and-george-papadopoulos-are-scheduled-to-speak-at-a-conference-organized-by-a-qanon-supporter/
[16] https://www.nytimes.com/2021/02/06/us/politics/michael-flynn-qanon.html
[17] https://thehill.com/blogs/blog-briefing-room/news/457384-flynn-papadopoulos-to-speak-at-event-preparing-social-media/
[18] https://apnews.com/article/reawaken-america-tour-michael-flynn-910e83b515185751be82868b227ca22e
[19] https://www.pbs.org/newshour/politics/former-trump-adviser-michael-flynn-at-the-center-of-new-movement-based-on-conspiracies-and-christian-nationalism
[20] https://www.eventbrite.com/e/halloween-with-general-michael-flynn-tickets-191144617697

local political dialogue through endorsing a candidate for Chair of the Republican Party of Sarasota County.[21]

There are two classes of public figures, "general" and "limited." General public figures are individuals who, by reason of fame or notoriety in a community, will in all cases be required to prove actual malice. Limited public figures, on the other hand, are individuals who have thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in regard to certain issues. *Saro Corp. v. Waterman Broad. Corp.*, 595 So. 2d 87, 88-89 (Fla. 2d DCA 1992), citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L. Ed. 2d 789 (1974).

Given that the Plaintiff is a former high-level Presidential appointee and the broad array of public issues that Plaintiff has inserted himself into (national security, Christian nationalism, protests against COVID-19 vaccines and masks, local political party leadership, and the 2020 Presidential Election to highlight a few), **it is apparent that Plaintiff is a general public figure who will be required to prove actual malice in all cases.**

ii. Plaintiff's status as a "public figure" deems his lawsuit meritless, as he has failed to make a sufficient showing of "actual malice."

Before a "public figure" may recover damages in a defamation action, **the public figure must prove actual malice on the part of the disseminator** of the information. *Saro Corp. v. Waterman Broad. Corp.*, 595 So. 2d 87, 88-89 (Fla. 2d DCA 1992), citing *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). The Plaintiff carries the burden of proof on this issue. See *Mastandrea v. Snow*, 333 So. 3d 326, 327-28 (Fla. 1st DCA 2022). Entry of final judgment in favor of a Defendant is appropriate where the Plaintiff has provided no evidence that the Defendant made their statements with actual malice. *Id.* at 328.

[21] https://www.heraldtribune.com/story/news/politics/2022/12/01/michael-flynn-backs-sarasota-gop-chair-candidate-who-praised-proud-boys/10795956002/; https://www.heraldtribune.com/story/news/politics/2022/08/16/donald-trump-ally-michael-flynn-explains-interest-sarasota-florida-politics-gop/10336193002/

Florida, of course, follows the federal test for "actual malice" that was first announced by the U.S. Supreme Court in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Proving actual malice requires the Plaintiff demonstrate that Defendant had (a) knowledge that his statements were false or (b) acted with reckless disregard as to whether his statements were false or not. *Id.* at 280. Such requirement to prove actual malice is in addition to proving the other elements of defamation.

The Plaintiff carries the burden of proof on this issue. See *Mastandrea v. Snow*, 333 So. 3d 326, 327-28 (Fla. 1st DCA 2022). Entry of summary judgment is appropriate where the Plaintiff has provided no evidence that the Defendant made their statements with actual malice. *Id.* at 328.

Statements that are not perfectly accurate are protected under the "substantial truth" doctrine if the "gist" or "sting" of the statement is true. *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1234 (Fla. 3d DCA 2021), citing *Masson v. New Yorker Mag.*, 501 U.S. 496, 517 (1991).

While Plaintiff alleges that Defendant made "defamatory statements knowing that they were false or with reckless disregard for the truth," **there is no sufficient allegation of facts demonstrating the basis for that assertion**. (Amended Complaint ¶ 116). The Plaintiff has provided no evidence that the Defendant knew he made false statements or acted with reckless disregard as to whether his statements were false.

iii. Defendant engaged in protected speech, and thus Plaintiff does not have an actionable claim for defamation.

While Defendant maintains his status as an investigative journalist, his reporting and statements of opinion regarding such a prominent political public figure are inherently political statements and should be interpreted as such. In reviewing political statements, it is necessary to read the entire publication in context, not simply the offending words. *Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 295 (Fla. 2d DCA 2001), citing *Pullum v.*

Johnson, 647 So. 2d 254, 258 (Fla. 1st DCA 1994). The publications that are in question are "not to be dissected and judged word for word or phrase by phrase, the entire publication must be examined." *Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 295 (Fla. 2d DCA 2001), citing *Desert Sun Publishing Co. v. Superior Court for Riverside County*, 158 Cal. Rptr. 519, 521, 97 Cal. App. 3d 49, 52 (1979). Many terms that could be considered factual in other contexts are considered opinion in the political context because of the tremendous imprecision of the meaning and usage of such terms in the realm of political debate. *Buckley v. Littell,* 539 F.2d 882, 893 (2d Cir. 1976). Given the Plaintiff's prominence as a political figure and the nature of Defendant's statements, such statements were obviously offered in a political context.

Florida law also recognizes the difference between statements presented as fact and statements presented as opinion or "rhetorical hyperbole." *Zambrano v. Devanesan*, 484 So. 2d 603, 606-07 (Fla. 4th DCA 1986). "Pure opinion is based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public." *Id.* Pure opinion is protected free speech under the First Amendment to the U.S. Constitution, and is not actionable under a cause of action of defamation. *Id.* "Rhetorical hyperbole" and "imaginative expression," which the U.S. Supreme Court has held to have "traditionally added much to the discourse of our Nation," is also protected as opinion. *Pullum v. Johnson*, 647 So. 2d 254, 256-57 (Fla. 1st DCA 1994), citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Use of hyperbolic and exaggerated rhetoric is commonplace in modern politics. Notably, Plaintiff himself engages in very similar rhetoric to that of Defendant on Twitter. A few examples of Plaintiff's rhetoric on Twitter are below[22]:

[22] https://twitter.com/GenFlynn/status/1676935279351930880?s=20 (last accessed Jul. 28, 2023); https://twitter.com/GenFlynn/status/1668463914055614465?s=20 (last accessed Jul. 28, 2023); https://twitter.com/GenFlynn/status/1672956053279916034?s=20 (last accessed Jul. 28, 2023); https://twitter.com/GenFlynn/status/1673418714052456455?s=20 (last accessed Jul. 28, 2023)


Tweet
General Mike Flynn
@GenFlynn
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We cannot allow ourselves to fall victim to the predatory pharmaceutical industry, their Marxist media minions and their puppets inside of the federal bureaucracy (elected and unelected officials) ever again.
@VigilantFox
@joerogan
@RobertKennedyJr
@elonmusk
The Vigilant Fox @VigilantFox · Jun 20
.@RobertKennedyJr Reveals Why Ivermectin Had to Be Destroyed
Ivermectin is often recognized – 2nd to penicillin – for having the greatest impact on human health. And its discovery won the Nobel Prize in 2015.
But its existence threatened a $200 billion vaccine enterprise.
"The... Show more
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which is that the most — to say
1:19
9:12 AM · Jun 25, 2023 · 261.7K Views


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.@ClimateAudit they all knew from the very beginning and they still allowed their crimes against the American people to be committed. These are NOT nebulous government departments, these are real people who worked in key offices of the "high and mighty" DOJ and the FBI, then proceeded to prosecute a lie and they knew it was a fabricated falsehood from the Day One.
You might ask how could anyone do this to their own country? Because they are less than human, soulless creatures, who hate the America that we all love.
They represent the scum of the earth and should be treated as such. And they and many others deserve a one way ticket to hell.
Stephen McIntyre @ClimateAudit · Jun 12
Onyshchenko's claimed connection to Weissmann in December 2016 (when Weissman meeting with Ohr, Strzok, Page and Zainab Ahmad) seems too implausible to be true, but here is copy of the signature of agreement between DOJ and Onyshchenko on Nov 29, 2016, referring to Weissmann
Show this thread


Tweet
General Mike Flynn
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Subscribe
"These [criminals] are running our country on the fumes of the empty gas tank of American democracy."
@KurtSchlichter
@TuckerCarlson
@ggreenwald
@RogerJStoneJr
@floydbrown
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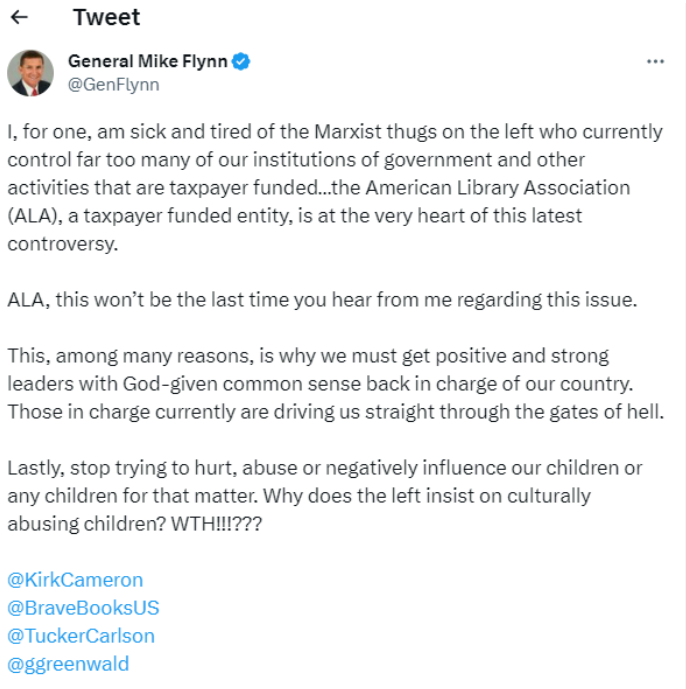
Our Alleged President Is a Corrupt Scumbag and the Ruling Class Is OK With ...
8:45 AM · Jul 6, 2023 · 84.5K Views
1,265 Retweets 38 Quotes 3,198 Likes 19 Bookmarks


Tweet
General Mike Flynn
@GenFlynn
I, for one, am sick and tired of the Marxist thugs on the left who currently control far too many of our institutions of government and other activities that are taxpayer funded...the American Library Association (ALA), a taxpayer funded entity, is at the very heart of this latest controversy.
ALA, this won't be the last time you hear from me regarding this issue.
This, among many reasons, is why we must get positive and strong leaders with God-given common sense back in charge of our country. Those in charge currently are driving us straight through the gates of hell.
Lastly, stop trying to hurt, abuse or negatively influence our children or any children for that matter. Why does the left insist on culturally abusing children? WTH!!!???
@KirkCameron
@BraveBooksUS
@TuckerCarlson
@ggreenwald

In approximately a one month period on Twitter, the Plaintiff accused numerous individuals of crimes, referred to the pharmaceutical industry as "predatory," and the media and American Library Association as "Marxist." These are accusations similar in tone and rhetorical style to those that Defendant made about Plaintiff. Surely, if Plaintiff himself engages in such rhetoric, it cannot be considered defamatory when he is the subject of like rhetoric and hyperbole.

The U.S. Supreme Court held that circumstances that could not be reasonably understood as describing actual facts or events about a person's conduct constituted hyperbole. *Hustler Mag. v. Falwell*, 485 U.S. 46, 57 (1988). The circumstances in which statements are expressed must play an essential role in arriving at a reasonable interpretation of whether such statement is defamatory. *Keller v. Miami Herald Pub. Co.*, 778 F.2d 711, 715 (11th Cir. 1985).

Additionally, "[c]ommentary or opinion based on facts that are set forth in the article or which are otherwise known or available to the reader or listener are not the stuff of libel," *Rammsen v. Collier County Publ'g Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006). Defendant's published statements are commentary and/or opinion that is based upon facts that are otherwise known or available to Defendant's audience.

Defendant's statements were all either true, statements of opinion, commentary or opinion based upon facts that are otherwise known or available to the readers, and/or uses of "rhetorical hyperbole" that could not be reasonably understood in context as describing actual facts or events. Given the rhetorical hyperbole that is commonplace on Twitter and the internet in general, such statements could not be reasonably understood as true. This is simply the kind of rhetoric and tone used on the internet. Thus, the use of such rhetorical hyperbole is not actionable.

iv. The Southern District of Florida recently protected journalistic use of similar rhetorical hyperbole.

On July 28, 2023, the Southern District of Florida granted Defendant Cable News Network, Inc.'s ("CNN") Motion to Dismiss a lawsuit filed against them by former President Donald J. Trump. *Donald J. Trump v. Cable News Network, Inc.*, Case No. 0:22-cv-61842-AHS (S.D.F.L. Jul. 28, 2023).

In *Trump vs. Cable News Network, Inc.*, former President Trump alleged that CNN defamed him by drawing comparisons of him to Adolf Hitler and the Nazi regime. These comparisons included a CNN Editor-at-Large saying that some of President Trump's remarks were "a near-replication" of an "infamous line" uttered by Nazi Joseph Goebbels and CNN's continued use of the phrase "the Big Lie"—an expression translated in German first used by Adolf Hitler—to describe President Trump's allegations and conduct regarding the 2020 Presidential election. *Id.* Similar to Plaintiff's theory in this case, President Trump argued that such rhetoric was defamatory due to inciting CNN's readers and viewers to "hate, contempt, distrust, ridicule, and even fear" him, as well as "underst[and] that [Trump] would be Hitler-like in any future political role." *Id*.

Based upon federal and Florida law of defamation, the Southern District of Florida dismissed President Trump's lawsuit based on clear legal precedent. "When applying state defamation law to public figures, the First Amendment imposes additional limitations." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.,* 6 F.4th 1247, 1252 (11th Cir. 2021). The statement in dispute "must be 'sufficiently factual to be susceptible of being proved true or false.'" *Id.* (quoting *Milkovich v. Lorain J. Co.,* 497 U.S. 1, 21 (1990)). A stacking of inferences cannot support a finding of falsehood. *See Church of Scientology of California v. Cazares,* 638 F.2d 1272, 1288 (5th Cir. 1981) *abrogated on other grounds, Blanchard v. Bergeron,* 489 U.S. 87 (1989). Notably, the "intention to portray [a] public figure in [a] negative light, even when motivated by ill will or

evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood." *Donald J. Trump for President, Inc. v. CNN Broad., Inc.,* 500 F. Supp. 3d 1349, 1357 n.4 (N.D. Ga. 2020) (quoting *Don King Productions, Inc. v. Walt Disney Co.,* 40 So. 3d 40, 50 (Fla. 4th DCA 2010). *See also Dershowitz v. Cable News Network,* 541 F. Supp. 3d 1354, 1370 (S.D. Fla. 2021) (political motivation irrelevant to defamation claim); *cf. Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666-67 (1989) (profit motive behind publication does not establish actual malice).

Ultimately, the Southern District of Florida determined on a Motion to Dismiss that CNN's comments were not statements of fact, and thus dismissed former President Trump's lawsuit because it "alleges no false statements of facts." *Id.* Additionally, speech leading to perceptions of a Plaintiff as "Hitler-like" or "authoritarian" are not statements of facts, because of the tremendous imprecision of the meaning and usage of such terms in the realm of political debate…." *Buckley v. Littell,* 539 F.2d 882, 893 (2d Cir. 1976). A connotation or implication is only actionable if it is "provably false." *Coral Ridge Ministries Media, Inc.,* 6 F.4th at 1252 (citing *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19-20 (1990).

In this instant case, the Plaintiff's theory is very similar to that espoused by former President Trump in *Trump v. Cable News Network, Inc.*. Like the publisher in the Trump case, Defendant is a journalist. Like CNN, Defendant has labeled a public figure Plaintiff in ways where someone could perceive the Plaintiff as being Hitler-like, a Nazi, or supporting authoritarianism. However, such labels used by the Defendant are purely statements of opinion. They cannot be perceived as statement of facts because the terms used by Defendant are tremendously imprecise in the realm of political debate. Because the Defendant's statements are purely protected opinion speech as they constitute political hyperbole, and the Plaintiff has failed to allege any false statements of facts. Nothing said by the Defendant is provably false. Therefore, like in *Trump*

v. Cable News Network, Inc., the Plaintiff's Complaint should be dismissed with prejudice.

v. Plaintiff has failed to offer any evidence of damages that directly resulted from Defendant's speech.

A common element to Plaintiff's claims for defamation and injurious falsehood is that he must have suffered actual damages. **Nothing besides Plaintiff's bare factual allegations support the contention that Defendant's conduct has damaged him.**

While Defendant's comments about Plaintiff are undoubtedly provocative, Plaintiff's business of promoting election integrity and reform—at least from a distance—appears to thrive on Plaintiff being given earned media from liberal journalists such as Defendant. Many of Plaintiff's most loyal supporters likely find some of Defendant's comments—such as that Plaintiff runs QAnon, helped plan and execute 1/6, is "Q", and that he colluded to overturn results of the 2016 election—as positives and some of the reasons that they fervently support Plaintiff's efforts, and in fact pay significant money to see Plaintiff speak in public.[23] Notably, people at such events have worn QAnon hats indicating their support for the QAnon movement.[24]

Plaintiff continues to generate this significant support among the public in spite of occasions where he has defended or advocated for violence, insurrections, and coups. At a deposition before the United States Congress, Plaintiff pled the Fifth Amendment to the questions of whether the violence that took place on January 6, 2021 was morally and legally justified, and to whether he believed in the peaceful transition of power.[25] Plaintiff also pled the Fifth Amendment in response to being asked why Kellye SoRelle—General Counsel and former interim President to the Oath Keepers—described him as

[23] https://www.pbs.org/wgbh/frontline/article/michael-flynn-reawaken-america-tour/
[24] *Id.*
[25] https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000051194/pdf/GPO-J6-TRANSCRIPT-CTRL0000051194.pdf

the "puppet handler" and "moving all the pieces" as it pertains to the events of January 6, 2021.[26] On another occasion, Plaintiff said that a Myanmar-like coup "should happen" in the United States.[27]

Thus, while many people may perceive Defendant's remarks about Plaintiff as negative, Plaintiff has generated his own business and following among a significant proportion of the population that see such things as positives. Thus, a question remains as to whether Defendant's comments were defamatory due to so many people seeing them as positive, and even if they are defamatory, a question persists as to how Plaintiff has suffered actual damages. After all, if Plaintiff has suffered financial losses over the past several years, there would be a real question as to whether such losses were because of Plaintiff's own provocative conduct which has made national and international headlines, or because of one journalist with a modest following on social media.

vi. Plaintiff's claim for injurious falsehood similarly fails.

For the Plaintiff to maintain a claim for injurious falsehood, he must demonstrate: (1) a false statement was made by or on behalf of the tortfeasor; (2) the statement disparages a property interest of the complainant; (3) the statement was published or communicated to a third person; (4) the statement was made with legal malice or with willful and wanton disregard of the rights of the complainant; (5) publication of the statement is a material and substantial cause of inducing other persons to refuse to deal with the complainant; and (6) the publication results in special damages to the complainant.

Instead of "actual malice," the standard for speech resulting in injurious falsehood is either (a) legal malice or (b) willful and wanton disregard of the rights of the complainant. 2 Florida Torts § 29.02 (2023). "Legal malice" generally means that the act was deliberate conduct without reasonable cause,

[26] *Id*.
[27] https://thehill.com/homenews/media/556209-michael-flynn-says-myanmar-like-coup-should-happen-in-the-us/

while "actual malice" necessary for punitive damages (or to overcome First Amendment privilege) means ill will, bad or evil motive, or such gross indifference to or reckless disregard of the rights of others as will amount to a willful or wanton act. *See Collier County Publishing Co. v. Chapman*, 318 So.2d 492, 495 (Fla. 2d DCA 1975), *cert. denied*, 333 So.2d 462 (Fla. 1976).

Notably, while the Plaintiff alleges to have lost business in the amount of $50 million, the Plaintiff has provided no evidence of lost business in that or any amount. Additionally, there is no causal nexus between the Plaintiff engaging in "the business of promoting election integrity and reform" (pursuant to Second Amended Complaint ¶ 147) and Defendant's statements about Plaintiff. Plaintiff has also offered no evidence regarding Defendant's intent of his statements, as it pertains to Plaintiff's business. Additionally, like with Plaintiff's defamation claim, Plaintiff has made no allegation or actual showing that Defendant acted with actual malice, legal malice, or engaged in a willful and wanton act with reckless disregard for his rights.

vii. Defendant should be awarded his attorney's fees.

If this Court is to deem that the Plaintiff' s lawsuit is in violation of Florida's anti-SLAPP statute, this Court should award the Defendant his entitlement to reasonable attorney's fees as the prevailing party in this matter, pursuant to Fla. Stat. § 768.295(4). The Court may reserve jurisdiction to determine the amount of those reasonable attorney's fees.

III. PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED AS IT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED.

Defendant moves this Court to dismiss Plaintiff's Amended Complaint because it fails to state a cause of action upon which relief may be granted. "'The purpose of a motion to dismiss is to test the legal sufficiency of [the] complaint, not to determine factual issues.'" *Rhiner v. Koyama*, 327 So. 3d 314, 316 (Fla. 4th DCA 2021), quoting *Sealy v. Perdido Key Oyster Bar & Marina,*

LLC, 88 So. 3d 366, 367–368 (Fla. 1st DCA 2012). Accordingly, "'[t]he trial court may not look beyond the four corners of [the] complaint when ruling on a motion to dismiss.'" *Id.*, quoting *Norwich v. Global Financial Associates, LLC*, 882 So. 2d 535, 536 (Fla. 4th DCA 2004). These principles extend only to the well-pled facts and do not extend to conclusions of law, legal opinion, or argument. See *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. 3d DCA 1978) (observing that court "will not be bound by bare allegations that are unsupported or unsupportable").

Motions to dismiss for failure to state a cause of action under *Fla. R. Civ. P.* 1.140(b)(6) are intended for use to determine the sufficiency of the facts alleged to state a cause of action. See *Payas v. Adventist Health System/Sunbelt, Inc.*, 238 So. 3d 887, 890 (Fla. 2d DCA 2018), quoting *Meadows Community Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1278 (Fla. 2d DCA 2006) (" 'It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them.' ").

Notably, Florida courts have held that **the legal sufficiency of a libel or defamation complaint by a public figure**, **such as Plaintiff, is subject to a more rigorous set of tests to determine legal sufficiency than most other types of cases.** *Greene v. Times Publ'g Co.*, 130 So. 3d 724, 728 (Fla. 3d DCA 2014).

Because these deficiencies in the Complaint have been brought up in both Defendant's Motion to Dismiss the Complaint and Defendant's Motion to Dismiss Amended Complaint, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice due to these defects.

A. Based on Plaintiff's own allegations within the Amended Complaint, he is a public figure.

Paragraph 18 and 19 of the Second Amended Complaint allege facts that by themselves would identify the Plaintiff as a "public figure." This is relevant factual pleading to determine whether the Plaintiff has ultimately pled the elements of defamation.

B. Plaintiff has failed to plead the elements of defamation of a public figure.

The five elements of a legally sufficient cause of action for defamation involving a public figure: (1) publication, (2) falsity, (3) the defendant's knowledge of, or reckless disregard for, the falsity (i.e., actual malice), (4) actual damages, and (5) the false statement must be defamatory. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

Notably, the Plaintiff has provided nothing beyond its bare allegations that Defendant's statements are false or that the defendant knew or recklessly disregarded the falsity of his statements. Additionally, Plaintiff has offered no tangible allegation of monetary damages, or evidence of the other damages claimed (in Second Amended Complaint ¶ 143).

Given the heightened standard for legal sufficiency of defamation claims filed by public figures such as the Plaintiff, Plaintiff's allegations in the Complaint are ultimately insufficient to support a cause of action for defamation.

C. Plaintiff has failed to plead the elements of injurious falsehood.

As previously stated, to maintain an action for injurious falsehood, a complainant must allege and prove the following elements: (1) a false statement was made by or on behalf of the tortfeasor; (2) the statement disparages a property interest of the complainant; (3) the statement was published or communicated to a third person; (4) the statement was made with legal malice or with willful and wanton disregard of the rights of the complainant; (5) publication of the statement is a material and substantial cause of inducing other persons to refuse to deal with the complainant; and (6) the publication results in special damages to the complainant.

Plaintiff has failed to clearly allege that Defendant's statements disparage his "property interest." Plaintiff is engaged in the business of "promoting election integrity and reform" (as described in Second Amended Complaint ¶ 147). The statements that the Plaintiff directly alleges (in Second Amended

Complaint ¶ 148) as disparaging his property interests do not directly relate to that business.

Additionally, the **Plaintiff has failed to allege that Defendant's conduct is a "material and substantial cause" of inducing other people to refuse to deal with the Plaintiff in his business.** While the Plaintiff does allege (in Second Amended Complaint ¶ 151) that the Defendant intended to harm the Plaintiff's business through his statements, that is a materially different allegation from the Defendant's publication of statement actually being a "material and substantial cause" of other persons refusing to deal with him. Additionally, the Plaintiff offered no proof or evidence of Defendant's intent to harm Plaintiff's business.

Additionally, Paragraph 148 of the Second Amended Complaint is overly broad in terms of which statements made by the Defendant have allegedly led to injurious falsehood.

Ultimately, the Plaintiff has failed to sufficiently plead a cause of action for injurious falsehood, and thus, such count should be dismissed.

IV. THE ADDITION OF DEFENDANT RICK WILSON TO THIS ACTION IS MISJOINDER.

One of the few differences between Plaintiff's original Complaint and Plaintiff's Amended Complaint is that it adds Rick Wilson as a co-Defendant. The addition of Rick Wilson as a Defendant in this case is misjoinder, and this Court should dismiss the Amended Complaint for that reason and/or sever Plaintiff's causes of action against Defendant and Mr. Wilson.

Fla. R. Civ. P. 1.210(a) states Florida's permissive joinder rule, which is that "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff." While this is a liberal standard, it is worth noting that Mr. Wilson is not an indispensable or even necessary party to Plaintiff's claims against Defendant. See *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 n.3 (Fla. 1984). Notably, the

purpose behind Florida's liberal joinder rule is to efficiently and expeditiously adjudicate the rights of parties, and the joinder of Mr. Wilson has made it more difficult for Defendant to efficiently and expeditiously adjudicate Plaintiff's dispute. *Shingleton v. Bussey*, 223 So. 2d 713, 718 (Fla. 1969).

The joinder of Plaintiff's claims against Mr. Wilson and MeidasTouch—as tenuous as they are—to its claims against this Defendant are inappropriate because the claims are separate, and the addition of Mr. Wilson (along with the changed amount in controversy) deprives Defendant of his right to transfer this action to federal court and will only lead to further delay.

Additionally, there is no alleged connection between Defendant and Mr. Wilson other than one singular instance of Mr. Wilson retweeting Defendant on May 14, 2023 (see Second Amended Complaint ¶ 87). Notably, **Mr. Wilson's tweet was made AFTER Plaintiff filed its original lawsuit against Stewartson**. The addition of Mr. Wilson interferes with Defendant defending against claims that were in existence at the original date of filing, and will only serve to confuse jurors regarding the vastly different amounts of damages and facts in controversy. The same can be said of Plaintiff's joinder of MeidasTouch in the Second Amended Complaint. In fact, the Plaintiff admits (in Second Amended Complaint ¶ 7) that the involvement of MeidasTouch Network began after the original lawsuit was filed, allegedly beginning on October 22, 2023.

While misjoinder by itself is not grounds for dismissal, misjoined parties must seek affirmative relief from the Court to be dropped from litigation in situations where the Plaintiff is unwilling to do so. *Fla. R. Civ. P. 1.250(a)*. Given that the joinder of a Florida resident in this action seems to be a strategic move by Plaintiff to claim increased damages while keeping this action out of federal court (by thwarting the diversity of citizenship that would exist between a Florida-resident Plaintiff and California-resident Defendant), it is highly unlikely that Plaintiff would consent to severing the action. Therefore, Defendant is seeking affirmative relief from this Court to be dropped from this litigation whether it be through severance, dismissal, or some other means.

If this Court declines to sever this action, Defendant respectfully requests that the damages against him be capped at the $75,000 initially requested under the original Complaint.

V. CONCLUSION & PRAYER FOR RELIEF

Defendant moves this honorable Court to dismiss Plaintiff's complaint with prejudice on the grounds that Plaintiff's lawsuit is a strategic lawsuit against public participation (SLAPP) prohibited under Florida's anti-SLAPP statute. Should this Court decline to dismiss the Complaint with prejudice on those grounds, Defendant requests that this Court dismiss Plaintiff's complaint on the grounds that it fails to state a cause of action upon which relief may be granted.

If this Court should decline dismissal, Defendant further requests that he be severed from this action due to misjoinder.

WHEREFORE, Defendant, JIM STEWARTSON, respectfully requests that this Court dismiss the lawsuit with prejudice and his favor, award him his reasonable attorney's fees under Fla. Stat. § 768.295(4), and grant him any other relief that this Court deems proper and just.

Dated: December 26, 2023

/s/ Craig A. Whisenhunt
Craig A. Whisenhunt, Esquire
FBN 81745

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and proper copy of the foregoing document was served upon Jared Roberts, Esquire, Jonathan Huffman, Esquire, James Boatman, Esquire, and Leonard Collins, Esquire via Florida E-Filing Portal on this 26th day of December, 2023.

/s/ Craig A. Whisenhunt

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